

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
Library of Congress  
Washington, D.C.

Received

Jul 7 2016

Copyright Royalty Board

**In the Matter of:**

**Determination of Royalty Rates and Terms  
for Transmission of Sound Recordings by  
Satellite Radio and "Preexisting"  
Subscription Services (SDARS III)**

**Docket No. 16-CRB-0001-SR/PSSR (2018-2022)**

**JOINT MOTION TO ADOPT PROTECTIVE ORDER**

Pursuant to 17 U.S.C. § 803(c)(5), the undersigned participants<sup>1</sup> (the "Movants") hereby respectfully and jointly request that the Judges enter the proposed protective order attached hereto as **Exhibit A** (the "Services Proposed Protective Order") or **Exhibit B** (the "SoundExchange Proposed Protective Order"). This proceeding will involve the introduction and exchange of testimony and other evidence that contains the participants' confidential information, including financial and pricing data, contracts with customers and partners, marketing and sales data, forecasts and business plans, technical specifications, and other commercially sensitive data. A protective order is necessary to prevent the disclosure of such information that, if disclosed, would place the parties at a competitive disadvantage in the marketplace.

Both versions of the proposed protective order, with the exception of Section V of the Services Proposed Protective Order ("Production of Documents Subject to Confidentiality

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<sup>1</sup> On Friday, June 3, 2016, counsel for SoundExchange sent a copy of this Motion to George Johnson (for GEO Music Group, *pro se*) and David Powell (for David Powell, *pro se*), indicating that the Movants intend to file this Motion on Tuesday, June 7, 2016, and asking for Messrs. Johnson and Powell to notify counsel for Movants by 6:00 p.m. EDT on Monday, June 6, 2016, if each would like to join the Motion and if each takes a position on the dispute discussed in Section III of the Motion. As of the date of filing, Messrs. Johnson and Powell have not responded to SoundExchange's request for their respective positions on this Motion.

Restrictions”), are nearly identical and are patterned after the protective order entered by the Judges in the *Webcasting IV* proceeding, Docket No. 14-CRB-0001-WR (2016-2020) (“*Web IV*”)<sup>2</sup> with a few non-substantive modifications.<sup>3</sup>

For the reasons described in Section III.A., *infra*, Sirius XM Radio Inc. (“SXM”), Music Choice, and Muzak LLC (“Muzak”), (collectively, the “Services”) are in favor of including Section V in the proposed protective order. SoundExchange (“SX”), The American Federation of Musicians of the United States and Canada (“AFM”), Screen Actors Guild and American Federation of Television and Radio Artists (“SAG-AFTRA”), American Association of Independent Music (“A2IM”), Universal Music Group (“UMG”), Sony Music Entertainment (“SME”), Warner Music Group (“WMG”), and Recording Industry Association of America (“RIAA”) (collectively, “SoundExchange”) are against including Section V in the proposed protective order.

The Movants respectfully request that the Judges enter a protective order so that each party will know from the outset the rules that will govern the use and treatment of confidential information.

#### **I. THE PROPOSED PROTECTIVE ORDER IS CONSISTENT WITH PREVIOUS PROTECTIVE ORDERS ISSUED BY THE JUDGES**

The proposed protective order is almost identical to the *Web IV* Protective Order, except for a few, minor modifications and except for a new provision that the Services seek to add (which SoundExchange opposes), as discussed below in Section III. These modifications are reflected in **Exhibit C** hereto. The Judges have consistently entered protective orders similar in

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<sup>2</sup> See Protective Order, Dkt No. 14-CRB-0001-WR (Oct. 10, 2014) (*Webcasting IV*) (the “*Web IV* Protective Order”).

<sup>3</sup> A redlined copy showing the changes between the *Web IV* Protective Order and the Services Proposed Protective Order is attached as **Exhibit C**.

material respects to that proposed here in previous rate-setting proceedings.<sup>4</sup> Moreover, the Notice of Participants, Commencement of Voluntary Negotiation Period, and Case Scheduling Order issued in this proceeding on March 14, 2016 (the “Notice and Scheduling Order”), contemplates a protective order being entered here. *See* Notice and Scheduling Order, at 3 (“The participants shall prepare a joint exhibit list, which shall include . . . whether the exhibit or any part of it is ‘restricted’ under the terms of any protective order.”).

## **II. THE COPYRIGHT ACT, APPLICABLE PRECEDENT, AND POLICY CONSIDERATIONS ALL FAVOR THE ISSUANCE OF THE PROPOSED PROTECTIVE ORDER**

Courts commonly issue similar protective orders, for reasons that are well-established. These protective orders “replace[] the need to litigate the claim to protection document-by-document” and thereby “expedite production, reduce costs, and avoid the burden on the court of document-by-document adjudication.” 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Fed. Practice and Procedure* § 2035 (3d ed.) (citations omitted).

### **A. Congress Specifically Provided For The Issuance Of Protective Orders In Proceedings Before The Copyright Royalty Board**

In enacting the Copyright Royalty and Distribution Reform Act of 2004 (the “Act”), Congress specifically provided for the issuance of a protective order like the one proposed here, in order to shield sensitive commercial and financial information from the public record so that participants would be able to provide the Judges with a full record of probative evidence without risking competitive harm. In doing so, Congress noted:

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<sup>4</sup> Protective Order, Dkt. No. 2009-1 CRB (Sept. 23, 2009) (Webcasting III); Protective Order, Dkt. No. 2005-1 CRB DTRA, (Oct. 26, 2005) (Webcasting II); Protective Order, Dkt. No. 2000-9 CARB DTRA 1 & 2 (Mar. 29, 2001) (Webcasting I); Protective Order, Dkt. No. 2011-1 CRB PSS/Satellite II (Nov. 16, 2011) (SDARS II); Protective Order, Dkt. No. 2006-1 CRB DSTR (Dec. 20, 2006) (SDARS I); Protective Order, Dkt. 2012-7 CRB SD 1999-2009 (Phase II) (Jul. 1, 2014) (Satellite Distribution Proceedings); Protective Order, Dkt. 2012-6 CRB CD 2004-2009 (Phase II) (Jul. 1, 2014) (Cable Distribution Proceedings).

Subsection 803(c)(5) provides that [the Judges] may issue orders to protect confidential information, including orders excluding confidential information from the record of the determination that is published or made available to the public....Participants expressed to the Committee the importance of protecting proprietary information during the course of a proceeding, after the official close of a proceeding, or in a final version of a report from the [Judges.] Because parties to the proceedings depend on this continuing protection when they make the decision to produce sensitive commercial and financial information, they argued that they would be deterred from submitting that information as part of the proceeding record in the absence of continuing protection. Since an overarching goal of the Committee is to create a complete and full record, the Committee has included this provision to ensure that parties will submit all necessary information providing the CRJs the opportunity to make well-informed decisions based on a full and complete record of the contested issues in proceedings.

H.R. Rep. No. 108-408, at 36 (2004).

Accordingly, Section 803(c)(5) of the Copyright Act provides: “The Copyright Royalty Judges may issue such orders as may be appropriate to protect confidential information, including orders excluding confidential information from the record of the determination that is published or made available to the public....” 17 U.S.C. § 803(c)(5). Consequently, the Judges are well within their authority to issue either the Services Proposed Protective Order or the SoundExchange Proposed Protective Order.

**B. A Protective Order Is Necessary To Protect Against Public Disclosure Of Information That Would Place The Producing Party At A Competitive Disadvantage**

A protective order is appropriate and necessary here. As in past proceedings, this proceeding will involve the introduction and exchange of testimony and other evidence incorporating details of a number of highly confidential recent and current license agreements, as well as companies’ confidential financial and pricing data, technical specifications, marketplace analyses, and other sensitive information. Limiting “restricted material” to review by outside counsel only is necessary in order to afford the Judges a full record while also assuring parties and witnesses that such competitively sensitive information will not fall into the hands of the



public, competitors, or counter-parties to related business transactions, some of whom may be other participants in this proceeding. Absent an appropriate protective order, the disclosure of such information risks undermining competition in the marketplace and limiting what otherwise should be presented to the Judges in this proceeding.

### **III. SECTION V – PRODUCTION OF DOCUMENTS SUBJECT TO CONFIDENTIALITY RESTRICTIONS**

The Services and SoundExchange agree on all aspects of the proposed protective order except for “Section V – Production of Documents Subject to Confidentiality Restrictions.” This provision did not appear in the protective orders issued by the Judges in prior proceedings, although it was the subject of a separate order issued by the Judges in *Web IV*. The Services’ proposed Section V provides as follows:

Responsive, non-privileged, discoverable documents will not be withheld from production solely because they are subject to confidentiality restrictions imposed by private agreement with another entity, whether or not that entity is a Participant to this proceeding. Participants are hereby ordered not to withhold from production responsive, non-privileged, discoverable documents on the grounds that they are subject to confidentiality provisions in private agreements with third parties. Such documents may be designated Restricted hereunder, and shall be subject to the provisions and protections of this Protective Order.

**Exhibit A**, Services Proposed Protective Order, at 6, § V (referred to herein as “Section V”).

Rather than burdening the Judges with competing briefs for one section of a protective order, the Movants’ respective positions are set forth below.

#### **A. The Services Request “Section V – Production Of Documents Subject To Confidentiality Restrictions” Be Included In The Protective Order**

In various prior proceedings, the presence of third-party, contractual confidentiality restrictions has created a recurring problem during discovery. In each successive discovery period, SoundExchange would withhold otherwise discoverable documents, such as license agreements, due to private contractual provisions in such documents requiring notice to, or

consent by, third parties before the documents could be disclosed. In each discovery period prior to the *Webcasting IV* proceeding, Licensee participants would have to wait until written objections to discovery requests were served, then meet and confer with SoundExchange, and then make the same motion to compel production, wait for the full briefing period to conclude, obtain the same order compelling production, and then wait for the documents to finally be produced, only to be put through the same process of pointless delay in every successive discovery period. In every such instance the Judges ultimately ordered production of relevant documents, notwithstanding any contractual confidentiality provisions, in light of the protection afforded by the protective orders in place in each proceeding. *See Order Granting Music Choice's Motion To Compel SoundExchange to Produce Certain License Agreements and Other Documents*, Docket No. 2011-1 CRB PSS/Satellite II (Aug. 3, 2012); *Order Granting In Part and Denying In Part Music Choice's Motion To Compel SoundExchange to Produce Certain License Agreements and Other Documents*, Docket No. 2011-1 CRB/Satellite II (Mar. 3, 2012); *Order Granting Music Choice's Motion to Compel Certain Documents*, Docket No. 2011-1 CRB PSS/Satellite II (Jan. 24, 2012); *Order Granting in Part and Denying in Part the Motion of XM Satellite Radio Inc., Sirius Satellite Radio Inc. and Music Choice to Compel SoundExchange to Produce Label License Agreements and Related Negotiation Documents*, Docket No. 2006-1 CRB DSTRA, at 2 (May 15, 2007); and *Order on Motion by DiMA, Radiobroadcasters, National Public Radio and Corporation for Public Broadcasting to Compel SoundExchange to produce Documents Related to the Testimony of Barrie Kessler*, Docket No. 2005-1 CRB DTRA, at 2 (Nov. 7, 2006).

In *Webcasting IV*, the Judges for the first time issued a standing order ruling that parties are not permitted to withhold documents that are otherwise discoverable on the basis of

confidentiality provisions under a private agreement and making that ruling generally applicable to discovery throughout the entire proceeding. *See Order Granting Services' Joint Motion to Compel SoundExchange to Produce License Agreements and Other Documents Withheld on Confidentiality Grounds*, Docket No. 14-CRB-0001-WR (Oct. 30, 2014) (Webcasting IV) (the "*Webcasting IV* Standing Order"). The Judges first held, consistent with the precedent cited above, that the presence of contractual confidentiality provisions is an improper ground for withholding production of responsive documents in light of the protections provided by the protective order consistently implemented in Copyright Royalty Board proceedings. *Id.* at 2. The Judges then noted the above-described history of this recurring problem and the prejudice to participants from the delays caused by requiring redundant motion practice to resolve the problem, and held that a standing order was justified:

Participants in earlier proceedings have also requested standing orders concerning production of confidential documents. To date, the Judges have declined to issue standing orders. *See, e.g., id.* at 2. The Judges recognize, however, that discovery timelines under the Act and rules are very tight, and that in past proceedings the Judges have had to rule on multiple motions to compel production of documents withheld due to confidentiality provisions. The Judges agree with the Moving Services that "[i]t is difficult to discern what legitimate purpose is served by forcing the Moving Services" – or any other participant – "to make the same motion over and over." Motion at 13. A standing order would improve the efficiency of the proceeding and would fall squarely within the Judges' inherent and express authority to manage proceedings. *See, e.g.,* 17 U.S.C. § 802(c).

*Webcasting IV Standing Order* at 2.

The Services respectfully suggest that the same reasoning is applicable in this proceeding, and that it is appropriate to address it now rather than wait until the discovery period has commenced and the clock is ticking. As the Judges have already (and repeatedly) decided, there is no justification to withhold otherwise discoverable documents on private confidentiality grounds after the standard protective order is in place, or to make the Services wait for the conclusion of repeated motion practice to gain access to documents that

SoundExchange and its witnesses can see and use to build its case. Nor is there any justification for requiring the participants “to make the same motion over and over.”

The Services do not believe that SoundExchange’s proposed alternative, that SoundExchange will voluntarily seek consent from any necessary co-parties after such time that it determines it will rely upon a specific license agreement for its written direct case and identify any such agreements so that the Services may make motions to compel production, is sufficient to alleviate the prejudice identified by the Judges in granting the *Webcasting IV* Standing Order. As a preliminary matter, this proposal only applies to license agreements that SoundExchange has selectively chosen to rely upon. The scope of discovery in this proceeding reaches far beyond that limited subset of license agreements. Moreover, SoundExchange’s proposal is exactly the same procedure that was in place in prior proceedings, and which caused the very prejudice of unjustified delays and repetitive motion practice that the Judges sought to relieve with the *Webcasting IV* Standing Order. Each separate discovery period in this proceeding is a mere 60 days, just the same as the “very tight” discovery timelines cited in that Order. The fact that there is an additional discovery period in this proceeding does not change the urgency of obtaining appropriate discovery within each such period.

Including Section V as part of the protective order from the outset of this proceeding is particularly appropriate, given that the protection of that protective order has been held to justify production of the documents at issue.<sup>5</sup> Moreover, this approach further improves the efficiency of the proceeding by obviating the need for any subsequent motion practice seeking

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<sup>5</sup> To the extent the Judges do not want the proposed protective order to include Section V, the Services respectfully request that the Judges enter a separate standing order similar to the *Webcasting IV* Standing Order.

an identical standing order. For all these reasons, the Services respectfully request the Judges enter the Services Proposed Protective Order, attached as **Exhibit A**.<sup>6</sup>

**B. SoundExchange Opposes The Addition Of “Section V – Production Of Documents Subject To Confidentiality Restrictions” To The Protective Order**

As it has in prior proceedings, SoundExchange expects to rely on digital music licensing agreements in support of its rate proposal in this proceeding. Those agreements are typically between a record company and a digital music service. Many of those agreements contain confidentiality provisions that prohibit each party from unilaterally waiving confidentiality without the written consent of the other party or a court order. SoundExchange and its counsel cannot simply disregard these confidentiality provisions by joining a motion to ask that the Judges waive their protection.

That said, SoundExchange understands the Services’ concerns and proposes to proceed in a way that will respect the agreements’ confidentiality provisions without prejudicing the Services. Written direct cases are due in approximately five months. SoundExchange is in the process of identifying agreements it may use in preparation of its written direct case. To the extent that an agreement requires notice to or written consent from the contracting party before the agreement may be disclosed to the Services’ outside counsel, SoundExchange will send a letter to the music service providing such notice or seeking such consent. For agreements identified before the start of the preliminary and disclosure period, SoundExchange will make a good faith effort to send those letters with sufficient time to obtain consent and produce the agreements by the first day of the preliminary disclosure and discovery period. In the event that consent has not been received for certain documents, SoundExchange will inform the

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<sup>6</sup> MRI takes no position on the proposed Section V.

Services of the identity and/or nature of those documents by the first day of the preliminary disclosure and discovery period so that the Services can seek an order from the Judges compelling disclosure.<sup>7</sup> SoundExchange will not oppose such a motion except to the extent it is contractually required to do so.

This process will not prejudice the Services. In *Web IV*, the Judges expressed concern about “very tight” discovery timelines during the post-written direct case discovery period. But under SoundExchange’s proposed process, the Services will have ample time to obtain digital licensing agreements that contain confidentiality provisions before the date for the filing of written direct statements.

#### **IV. CONCLUSION**

The Services and SoundExchange respectfully request that the Judges enter either the Services Proposed Protective Order or the SoundExchange Proposed Protective Order, as discussed above, sufficiently in advance of the preliminary disclosure and discovery period so that the parties have the benefit of knowing from the beginning the rules that will govern the use and treatment of confidential information.

*[Remainder of page intentionally left blank]*

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<sup>7</sup> Given that the deadline for the filing of written direct cases is still several months from now, it is possible that SoundExchange will identify additional agreements that it may want to use at a later date. In that case, SoundExchange will promptly follow the same process of sending letters and providing information to opposing counsel with respect to any service that has not consented to the disclosure of its agreement.

Dated: June 7, 2016

Respectfully submitted,

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# EXHIBIT A

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
The Library of Congress

*In re*

**Determination of Royalty Rates and Terms  
for Transmission of Sound Recordings by  
Satellite Radio and “Preexisting”  
Subscription Services (SDARS III)**

**Docket No. 16–CRB–0001–SR/PSSR (2018–2022)**

**PROTECTIVE ORDER**

**I. The Participants**

As of the date of this Order, \_\_\_\_\_ participants remain active in the captioned proceeding (the “Participants”). This Protective Order pertains to the captioned proceeding only, and binds the remaining Participants.

**II. Authority**

The Copyright Royalty Judges (the “Judges”) reiterate a strong presumption that the public interest favors access to the records of the subject proceeding. Section 803(c)(5) of the Copyright Act (the “Act”) nonetheless authorizes the Judges to issue protective orders “as may be appropriate to protect confidential information . . .” 17 U.S.C. § 803(c)(5). In prior proceedings, the Judges have issued protective orders to facilitate and expedite discovery in both rate determination and distribution proceedings.<sup>1</sup>

**III. Protected Material**

The Act does not define “confidential information.” The Participants, however, agree that in this proceeding (as has been proposed by participants in prior proceedings) that “confidential information” protectable under this Order shall consist of commercial or financial information disclosed by any means (including, but not limited to, through documents, testimony, or argument), by a Participant (the “Producing Participant”) to another Participant or other Participants, that the Producing Party has reasonably determined in good faith would, if disclosed, either (i) result in a competitive disadvantage to the producing Participant, (ii) provide a competitive advantage to another Participant or entity, or (iii) interfere with the ability of the Producing Participant to obtain like information from other Participants or entities in the future.

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<sup>1</sup> See, e.g., Protective Order, Dkt. No. 14-CRB-0001-WR (Oct. 10, 2014) (Webcasting IV); Protective Order, Docket No. 2009-1 (Sept. 23, 2009) (Webcasting III); Protective Order, Dkt. No. 2011-1 CRB PSS/Satellite II (Nov. 16, 2011) (SDARS II).

The Participants further agree in this proceeding, as they have in prior proceedings, to exempt from the requirements of this Order any document or information that (i) may be found in the public records of the Copyright Royalty Board, the Copyright Office, or any other federal or state governmental agency; or (ii) was, is, or during the pendency of the subject proceeding becomes, legitimately, public information.

#### **IV. Protective Measures**

##### **A. Production**

The Producing Participant shall mark with a conspicuous label of “RESTRICTED – Subject to Protective Order in Docket No. 16–CRB–0001–SR/PSSR (2018–2022) (SDARS III)” all material that the Producing Participant, reasonably and in good faith, asserts to be “confidential information” protected by this order (such material hereinafter referred to as “Restricted”). The Producing Participant shall mark Restricted portions with highlights or brackets, marking information to the narrowest extent possible to achieve the goal of maintaining confidentiality.

The Producing Participant shall deliver with all Restricted materials an affidavit or declaration signed under penalty of perjury listing a description of all materials marked with the “Restricted” stamp and the basis for the designation.

##### **B. Receipt**

A Participant may receive Restricted materials only by and through outside counsel of record in this proceeding. Any Participant receiving Restricted material from another Participant or other Participants in this proceeding (“Receiving Participant”) shall use the Restricted material solely for the purposes of this proceeding, and shall guard and maintain the confidentiality of all Restricted materials. The Receiving Participant, by and through counsel of record in this proceeding, shall execute and abide by a Non-Disclosure Certificate, substantially in the form attached to this order as “Exhibit A.” Before revealing Restricted materials to any other entity, the Receiving Participant shall obtain from an authorized representative of the receiving entity a Non-Disclosure Certificate in like form.

The Receiving Participant shall limit access to Restricted materials to:

- outside counsel of record in this proceeding, including attorneys, paralegals and clerical employees required by involvement in this proceeding to view the Restricted materials;
- the personnel supplied by any independent contractor (including litigation support service personnel) with whom such attorneys work, to the extent counsel deems necessary for the sole purpose of assisting in this proceeding; and
- any outside independent consultant or expert (hereinafter, “expert”) who is assisting a Participant to the proceeding and to whom counsel determines disclosure is necessary for the limited purpose of assisting in, or consulting with respect to, this proceeding.

A consultant or expert is "independent" if he or she has no interest, financial or otherwise, in the outcome of this proceeding, and is not an employee of, and plays no ongoing role in the management of, (i) any Participant or any competitor thereof, (ii) a trade association that represents Participants or competitors or members of Participants or competitors, or (iii) a member of a trade association or licensing agent that is a Participant. If any Participant seeks to challenge the independence of another Participant's designated expert, the Participants shall follow the procedure described in section D of this Protective Order.

### **C. Use of Restricted Materials**

The Receiving Participant may use Restricted materials, plainly marked in accordance with this Protective Order and filed under seal, in any portion of this proceeding, including during the examination of witnesses, at closing argument, and in its proposed findings and conclusions.

When a Participant refers to Restricted materials in any filings with the Judges, the Participant shall file the Restricted materials under seal and file concurrently suitably redacted papers for inclusion in the Judges' public record. Any Participant or other entity that files redacted and sealed papers must also file a "redaction log" containing, for every item claimed as Restricted, (1) an identification of the document or other source by title, page number, and Producing Participant; (2) the basis or bases for the redaction; and (3) a description of the redacted material sufficient to permit any receiving or reviewing Participant to challenge the material's designation as Restricted.

Examination of a witness concerning Restricted material shall be conducted *in camera* and closed to all persons except Participants authorized by the terms of this Protective Order. Any portion of the hearing transcript that refers to Restricted material shall be sealed and subject to this Protective Order. To the extent possible, the court reporter shall segregate into separate transcripts information designated as Restricted, with blank, consecutively numbered pages being provided in a non-designated main transcript. The separate transcript containing Restricted material shall have page numbers that correspond to the blank pages in the main transcript. Participants shall provide copies of all Restricted materials that the Judges admit into evidence in sealed, confidential envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order.

Within twenty-one (21) days after the conclusion of this proceeding,<sup>2</sup> the Receiving Participant of any Restricted materials shall return to the Producing Participant all Restricted materials, including any additional copies, notes, or records in any form reflecting the contents of Restricted materials. In the alternative, the Receiving Participant may destroy all Restricted materials, additional copies, notes, and records in any form reflecting the contents of the Restricted materials and must tender to counsel for the Producing Participant an affidavit or declaration under penalty of perjury verifying that all Restricted materials, copies, notes, and records were destroyed. Nothing in these paragraphs shall prohibit a Participant's outside

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<sup>2</sup> The conclusion of this proceeding shall occur at the resolution of all available appeals or, if no Participant files an appeal, at the end of the time period allowed for noting an appeal.

counsel from retaining copies of any written testimony, brief, motion, pleading, or other filed document, exhibit, transcript, or internal memorandum that reflects Restricted materials, provided that any Restricted materials retained by counsel shall remain subject to the provisions of this Protective Order.

**D. Motions to Expand the Scope of the Protective Order or to Challenge Designation of Restricted Materials**

All Participants shall use the following procedure to seek permission to disclose Restricted materials to a person or entity not expressly authorized by the Protective Order or to challenge the nature or extent of the Producing Participant's Restricted designation(s).

1. The Receiving Participant shall notify the Producing Participant by email of the details of its request. In a document attachment to the email, the Receiving Participant shall state, in detail, the factual and legal bases for its request.

2. Within four (4) business days, the Producing Participant shall respond by email. If the Producing Participant does not agree to the Receiving Participant's request, then in a document attachment to the email, the Producing Participant shall state the factual and legal bases for its refusal to agree. If the Producing Participant fails to respond to the request or fails to attach the required document, then the Judges may grant the request.

3. On the same date as calculated for step 2, if the Producing Participant has objected to the Receiving Participant's request, in whole or in part, the Producing Participant shall file with the Judges, in accordance with the Judges' procedural regulations, the Participants' emails and attachments and shall also forward them to the Judges by email at [crb@loc.gov](mailto:crb@loc.gov). The Judges will consider the papers submitted by the Producing Participant to be a motion by the Receiving Participant and a response by the Producing Participant. The Judges will not accept from the Producing Participant or the Receiving Participant any papers that have not been already provided to the other Participant in interest. The Producing Participant shall deliver these emails and attachments to all Participants in this proceeding in accordance with the Judges' procedural regulations.

4. Any Participant other than the Producing Participant or the Receiving Participant wishing to make a substantive filing with regard to the request and the objection thereto shall file a written submission with the Judges within two (2) business days after receiving notice of the motion, delivering the response papers to all other Participants in this proceeding, and shall forward the submission to the Judges by email at [crb@loc.gov](mailto:crb@loc.gov). However, no other Participant may seek permission to disclose Restricted materials or to challenge a Restricted designation in these submissions.

5. The Judges will decide the issue(s) as soon as possible on the basis of the papers filed and delivered through the procedure described above, without reply papers or oral argument, unless the Judges order otherwise.

The Producing Participant shall bear the burden of justifying the designation or limitation it seeks to impose.

**E. Inadvertent Disclosure of Privileged Material**

The inadvertent production or filing of any document or other information in connection with this proceeding shall be without prejudice to any claim that the inadvertently disclosed material is privileged under the attorney-client or other privilege, or protected from disclosure as work product, and the Producing Participant or filing Participant shall not be held to have waived any rights by inadvertent production. In the event that a Producing Participant discloses or files inadvertently disclosed material that the Producing Participant or filing Participant considers to be privileged in whole or in part, the Producing Participant or filing Participant may retrieve the inadvertently disclosed material by giving written notice to the Receiving Participant(s) no later than five (5) business days after discovery of the inadvertent production or filing of such material. The notice must state the nature of the privilege.

Upon receipt of notice, each Receiving Participant shall promptly return to the Producing Participant or filing Participant the original and all copies of the material to which the notice pertains. In the event that only part of the material is claimed to be privileged, the Producing Participant or filing Participant shall furnish redacted copies of the material (removing only those parts claimed to be privileged) to all Receiving Participants, together with the written notice. Upon receipt of the redacted copy, each Receiving Participant shall return promptly to the Producing Participant or filing Participant the original and all copies of the unredacted material.

**F. Inadvertent Failure to Designate**

The inadvertent failure by a Producing Participant to designate any document or other information as "RESTRICTED" material under this Protective Order shall not waive any such designation provided that within five (5) business days of the Producing Participant learning of the inadvertent failure to designate, the Producing Participant notifies all Receiving Participants that such document or other information is protected under this Protective Order. The Producing Participant shall reproduce the document or other information with the correct confidentiality designation concurrently with its notification to the Receiving Participants. Upon receiving the document or other information with the correct confidentiality designation, the Receiving Participants shall return or securely destroy, at the Producing Participant's option, all documents or other information that were not properly designated.

A Receiving Participant shall not be in breach of this Protective Order for any use of the documents or other information before the Receiving Participant receives notice that such material is protected under this Protective Order, unless an objectively reasonable person would have realized that the material should have been appropriately designated as Restricted under this Protective Order. Once a Receiving Participant has received notice of the correct designation for the material, the Receiving Participant shall treat the material as Restricted under this Protective Order, reserving all rights to assert that the re-designation is not proper under the procedures set forth herein regarding the challenging of designations.

Notwithstanding the above, a subsequent designation of "RESTRICTED" shall apply on a going-forward basis.

**G. Inadvertent Disclosure to Unauthorized Persons**

In the event of a disclosure of any Restricted materials pursuant to this Protective Order to any person or persons not authorized under this Protective Order, the Participant responsible for having made the unauthorized disclosure, and each Participant with knowledge thereof, shall notify immediately counsel for the Producing Participant whose Restricted materials have been disclosed and provide to said counsel all known relevant information concerning the nature and circumstances of the disclosure. The responsible disclosing Participant shall also promptly take all reasonable measures to retrieve the improperly disclosed Restricted materials, and to ensure that no further or greater unauthorized disclosure and/or use thereof occurs.

Unauthorized or inadvertent disclosure shall not change the status of Restricted materials or waive the right to designate the disclosed document or information as "RESTRICTED."

**V. Production of Documents Subject to Confidentiality Restrictions**

Responsive, non-privileged, discoverable documents will not be withheld from production solely because they are subject to confidentiality restrictions imposed by private agreement with another entity, whether or not that entity is a Participant to this proceeding. Participants are hereby ordered not to withhold from production responsive, non-privileged, discoverable documents on the grounds that they are subject to confidentiality provisions in private agreements with third parties. Such documents may be designated Restricted hereunder, and shall be subject to the provisions and protections of this Protective Order.

**VI. Failure to Comply**

The Judges may sanction violations of this Protective Order as they deem appropriate to the fullest extent permitted by law, including by excluding evidence obtained, developed, or handled in any way contrary to the requirements of this Order.

**VII. Order**

Based upon the foregoing agreements of the Participants, the Judges adopt the definition of "confidential information" subject to the terms of this Protective Order as detailed in part III above. The Judges hereby ORDER compliance with parts IV and V of this Protective Order and endorse the sanctions described in part VI.

**SO ORDERED.**

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**Suzanne M. Barnett**  
**Chief Copyright Royalty Judge**

**DATED:** \_\_\_\_\_



# **EXHIBIT A**

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
The Library of Congress

*In re*

**Determination of Royalty Rates and Terms  
for Transmission of Sound Recordings by  
Satellite Radio and "Preexisting"  
Subscription Services (SDARS III)**

Docket No. 16-CRB-0001-SR/PSSR (2018-2022)

**NON-DISCLOSURE CERTIFICATE**

I certify that:

1. Restricted materials provided to me in connection with the captioned proceeding are subject to the terms and restrictions of the Protective Order entered on \_\_\_\_\_, 2016;
2. I have received and read the Protective Order, and I have no unanswered questions regarding the content or implications of the Protective Order;
3. I and any firm designated below qualify under the Protective Order to have access to Restricted materials;
4. I and any firm designated below agree to be bound by the Protective Order;
5. I shall not disclose or use the contents of Restricted materials, or any notes, memoranda, or other form of information reflecting the contents of the Restricted materials, other than in accordance with the terms of the Protective Order;
6. When informed by counsel for my client, I shall return or destroy Restricted materials as provided by the Protective Order; and
7. I understand that a violation of this certificate constitutes a violation of an order of the Copyright Royalty Judges.

I certify that I am authorized to represent and sign on behalf of any "Organization" that is identified below and to bind agents and employees of the Organization to the terms of the Protective Order.

DATED:

\_\_\_\_\_  
SIGNATURE  
ORGANIZATION:

\_\_\_\_\_  
PRINT NAME  
TITLE:



# EXHIBIT B

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
The Library of Congress

*In re*

**Determination of Royalty Rates and Terms  
for Transmission of Sound Recordings by  
Satellite Radio and “Preexisting”  
Subscription Services (SDARS III)**

**Docket No. 16–CRB–0001–SR/PSSR (2018–2022)**

**PROTECTIVE ORDER**

**I. The Participants**

As of the date of this Order, \_\_\_\_\_ participants remain active in the captioned proceeding (the “Participants”). This Protective Order pertains to the captioned proceeding only, and binds the remaining Participants.

**II. Authority**

The Copyright Royalty Judges (the “Judges”) reiterate a strong presumption that the public interest favors access to the records of the subject proceeding. Section 803(c)(5) of the Copyright Act (the “Act”) nonetheless authorizes the Judges to issue protective orders “as may be appropriate to protect confidential information . . .” 17 U.S.C. § 803(c)(5). In prior proceedings, the Judges have issued protective orders to facilitate and expedite discovery in both rate determination and distribution proceedings.<sup>1</sup>

**III. Protected Material**

The Act does not define “confidential information.” The Participants, however, agree that in this proceeding (as has been proposed by participants in prior proceedings) that “confidential information” protectable under this Order shall consist of commercial or financial information disclosed by any means (including, but not limited to, through documents, testimony, or argument), by a Participant (the “Producing Participant”) to another Participant or other Participants, that the Producing Party has reasonably determined in good faith would, if disclosed, either (i) result in a competitive disadvantage to the producing Participant, (ii) provide a competitive advantage to another Participant or entity, or (iii) interfere with the ability of the Producing Participant to obtain like information from other Participants or entities in the future.

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<sup>1</sup> See, e.g., Protective Order, Dkt. No. 14-CRB-0001-WR (Oct. 10, 2014) (Webcasting IV); Protective Order, Docket No. 2009-1 (Sept. 23, 2009) (Webcasting III); Protective Order, Dkt. No. 2011-1 CRB PSS/Satellite II (Nov. 16, 2011) (SDARS II).

The Participants further agree in this proceeding, as they have in prior proceedings, to exempt from the requirements of this Order any document or information that (i) may be found in the public records of the Copyright Royalty Board, the Copyright Office, or any other federal or state governmental agency; or (ii) was, is, or during the pendency of the subject proceeding becomes, legitimately, public information.

#### **IV. Protective Measures**

##### **A. Production**

The Producing Participant shall mark with a conspicuous label of “RESTRICTED – Subject to Protective Order in Docket No. 16–CRB–0001–SR/PSSR (2018–2022) (SDARS III)” all material that the Producing Participant, reasonably and in good faith, asserts to be “confidential information” protected by this order (such material hereinafter referred to as “Restricted”). The Producing Participant shall mark Restricted portions with highlights or brackets, marking information to the narrowest extent possible to achieve the goal of maintaining confidentiality.

The Producing Participant shall deliver with all Restricted materials an affidavit or declaration signed under penalty of perjury listing a description of all materials marked with the “Restricted” stamp and the basis for the designation.

##### **B. Receipt**

A Participant may receive Restricted materials only by and through outside counsel of record in this proceeding. Any Participant receiving Restricted material from another Participant or other Participants in this proceeding (“Receiving Participant”) shall use the Restricted material solely for the purposes of this proceeding, and shall guard and maintain the confidentiality of all Restricted materials. The Receiving Participant, by and through counsel of record in this proceeding, shall execute and abide by a Non-Disclosure Certificate, substantially in the form attached to this order as “Exhibit A.” Before revealing Restricted materials to any other entity, the Receiving Participant shall obtain from an authorized representative of the receiving entity a Non-Disclosure Certificate in like form.

The Receiving Participant shall limit access to Restricted materials to:

- outside counsel of record in this proceeding, including attorneys, paralegals and clerical employees required by involvement in this proceeding to view the Restricted materials;
- the personnel supplied by any independent contractor (including litigation support service personnel) with whom such attorneys work, to the extent counsel deems necessary for the sole purpose of assisting in this proceeding; and
- any outside independent consultant or expert (hereinafter, “expert”) who is assisting a Participant to the proceeding and to whom counsel determines disclosure is necessary for the limited purpose of assisting in, or consulting with respect to, this proceeding.

A consultant or expert is "independent" if he or she has no interest, financial or otherwise, in the outcome of this proceeding, and is not an employee of, and plays no ongoing role in the management of, (i) any Participant or any competitor thereof, (ii) a trade association that represents Participants or competitors or members of Participants or competitors, or (iii) a member of a trade association or licensing agent that is a Participant. If any Participant seeks to challenge the independence of another Participant's designated expert, the Participants shall follow the procedure described in section D of this Protective Order.

### **C. Use of Restricted Materials**

The Receiving Participant may use Restricted materials, plainly marked in accordance with this Protective Order and filed under seal, in any portion of this proceeding, including during the examination of witnesses, at closing argument, and in its proposed findings and conclusions.

When a Participant refers to Restricted materials in any filings with the Judges, the Participant shall file the Restricted materials under seal and file concurrently suitably redacted papers for inclusion in the Judges' public record. Any Participant or other entity that files redacted and sealed papers must also file a "redaction log" containing, for every item claimed as Restricted, (1) an identification of the document or other source by title, page number, and Producing Participant; (2) the basis or bases for the redaction; and (3) a description of the redacted material sufficient to permit any receiving or reviewing Participant to challenge the material's designation as Restricted.

Examination of a witness concerning Restricted material shall be conducted *in camera* and closed to all persons except Participants authorized by the terms of this Protective Order. Any portion of the hearing transcript that refers to Restricted material shall be sealed and subject to this Protective Order. To the extent possible, the court reporter shall segregate into separate transcripts information designated as Restricted, with blank, consecutively numbered pages being provided in a non-designated main transcript. The separate transcript containing Restricted material shall have page numbers that correspond to the blank pages in the main transcript. Participants shall provide copies of all Restricted materials that the Judges admit into evidence in sealed, confidential envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order.

Within twenty-one (21) days after the conclusion of this proceeding,<sup>2</sup> the Receiving Participant of any Restricted materials shall return to the Producing Participant all Restricted materials, including any additional copies, notes, or records in any form reflecting the contents of Restricted materials. In the alternative, the Receiving Participant may destroy all Restricted materials, additional copies, notes, and records in any form reflecting the contents of the Restricted materials and must tender to counsel for the Producing Participant an affidavit or declaration under penalty of perjury verifying that all Restricted materials, copies, notes, and records were destroyed. Nothing in these paragraphs shall prohibit a Participant's outside

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<sup>2</sup> The conclusion of this proceeding shall occur at the resolution of all available appeals or, if no Participant files an appeal, at the end of the time period allowed for noting an appeal.

counsel from retaining copies of any written testimony, brief, motion, pleading, or other filed document, exhibit, transcript, or internal memorandum that reflects Restricted materials, provided that any Restricted materials retained by counsel shall remain subject to the provisions of this Protective Order.

**D. Motions to Expand the Scope of the Protective Order or to Challenge Designation of Restricted Materials**

All Participants shall use the following procedure to seek permission to disclose Restricted materials to a person or entity not expressly authorized by the Protective Order or to challenge the nature or extent of the Producing Participant's Restricted designation(s).

1. The Receiving Participant shall notify the Producing Participant by email of the details of its request. In a document attachment to the email, the Receiving Participant shall state, in detail, the factual and legal bases for its request.

2. Within four (4) business days, the Producing Participant shall respond by email. If the Producing Participant does not agree to the Receiving Participant's request, then in a document attachment to the email, the Producing Participant shall state the factual and legal bases for its refusal to agree. If the Producing Participant fails to respond to the request or fails to attach the required document, then the Judges may grant the request.

3. On the same date as calculated for step 2, if the Producing Participant has objected to the Receiving Participant's request, in whole or in part, the Producing Participant shall file with the Judges, in accordance with the Judges' procedural regulations, the Participants' emails and attachments and shall also forward them to the Judges by email at [crb@loc.gov](mailto:crb@loc.gov). The Judges will consider the papers submitted by the Producing Participant to be a motion by the Receiving Participant and a response by the Producing Participant. The Judges will not accept from the Producing Participant or the Receiving Participant any papers that have not been already provided to the other Participant in interest. The Producing Participant shall deliver these emails and attachments to all Participants in this proceeding in accordance with the Judges' procedural regulations.

4. Any Participant other than the Producing Participant or the Receiving Participant wishing to make a substantive filing with regard to the request and the objection thereto shall file a written submission with the Judges within two (2) business days after receiving notice of the motion, delivering the response papers to all other Participants in this proceeding, and shall forward the submission to the Judges by email at [crb@loc.gov](mailto:crb@loc.gov). However, no other Participant may seek permission to disclose Restricted materials or to challenge a Restricted designation in these submissions.

5. The Judges will decide the issue(s) as soon as possible on the basis of the papers filed and delivered through the procedure described above, without reply papers or oral argument, unless the Judges order otherwise.

The Producing Participant shall bear the burden of justifying the designation or limitation it seeks to impose.



#### **E. Inadvertent Disclosure of Privileged Material**

The inadvertent production or filing of any document or other information in connection with this proceeding shall be without prejudice to any claim that the inadvertently disclosed material is privileged under the attorney-client or other privilege, or protected from disclosure as work product, and the Producing Participant or filing Participant shall not be held to have waived any rights by inadvertent production. In the event that a Producing Participant discloses or files inadvertently disclosed material that the Producing Participant or filing Participant considers to be privileged in whole or in part, the Producing Participant or filing Participant may retrieve the inadvertently disclosed material by giving written notice to the Receiving Participant(s) no later than five (5) business days after discovery of the inadvertent production or filing of such material. The notice must state the nature of the privilege.

Upon receipt of notice, each Receiving Participant shall promptly return to the Producing Participant or filing Participant the original and all copies of the material to which the notice pertains. In the event that only part of the material is claimed to be privileged, the Producing Participant or filing Participant shall furnish redacted copies of the material (removing only those parts claimed to be privileged) to all Receiving Participants, together with the written notice. Upon receipt of the redacted copy, each Receiving Participant shall return promptly to the Producing Participant or filing Participant the original and all copies of the unredacted material.

#### **F. Inadvertent Failure to Designate**

The inadvertent failure by a Producing Participant to designate any document or other information as "RESTRICTED" material under this Protective Order shall not waive any such designation provided that within five (5) business days of the Producing Participant learning of the inadvertent failure to designate, the Producing Participant notifies all Receiving Participants that such document or other information is protected under this Protective Order. The Producing Participant shall reproduce the document or other information with the correct confidentiality designation concurrently with its notification to the Receiving Participants. Upon receiving the document or other information with the correct confidentiality designation, the Receiving Participants shall return or securely destroy, at the Producing Participant's option, all documents or other information that were not properly designated.

A Receiving Participant shall not be in breach of this Protective Order for any use of the documents or other information before the Receiving Participant receives notice that such material is protected under this Protective Order, unless an objectively reasonable person would have realized that the material should have been appropriately designated as Restricted under this Protective Order. Once a Receiving Participant has received notice of the correct designation for the material, the Receiving Participant shall treat the material as Restricted under this Protective Order, reserving all rights to assert that the re-designation is not proper under the procedures set forth herein regarding the challenging of designations.

Notwithstanding the above, a subsequent designation of "RESTRICTED" shall apply on a going-forward basis.

**G. Inadvertent Disclosure to Unauthorized Persons**

In the event of a disclosure of any Restricted materials pursuant to this Protective Order to any person or persons not authorized under this Protective Order, the Participant responsible for having made the unauthorized disclosure, and each Participant with knowledge thereof, shall notify immediately counsel for the Producing Participant whose Restricted materials have been disclosed and provide to said counsel all known relevant information concerning the nature and circumstances of the disclosure. The responsible disclosing Participant shall also promptly take all reasonable measures to retrieve the improperly disclosed Restricted materials, and to ensure that no further or greater unauthorized disclosure and/or use thereof occurs.

Unauthorized or inadvertent disclosure shall not change the status of Restricted materials or waive the right to designate the disclosed document or information as "RESTRICTED."

**V. Failure to Comply**

The Judges may sanction violations of this Protective Order as they deem appropriate to the fullest extent permitted by law, including by excluding evidence obtained, developed, or handled in any way contrary to the requirements of this Order.

**VI. Order**

Based upon the foregoing agreements of the Participants, the Judges adopt the definition of "confidential information" subject to the terms of this Protective Order as detailed in part III above. The Judges hereby ORDER compliance with part IV of this Protective Order and endorse the sanctions described in part V.

**SO ORDERED.**

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**Suzanne M. Barnett**  
**Chief Copyright Royalty Judge**

**DATED:** \_\_\_\_\_

# **EXHIBIT A**

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
The Library of Congress

*In re*

**Determination of Royalty Rates and Terms  
for Transmission of Sound Recordings by  
Satellite Radio and "Preexisting"  
Subscription Services (SDARS III)**

Docket No. 16-CRB-0001-SR/PSSR (2018-2022)

**NON-DISCLOSURE CERTIFICATE**

I certify that:

1. Restricted materials provided to me in connection with the captioned proceeding are subject to the terms and restrictions of the Protective Order entered on \_\_\_\_\_, 2016;
2. I have received and read the Protective Order, and I have no unanswered questions regarding the content or implications of the Protective Order;
3. I and any firm designated below qualify under the Protective Order to have access to Restricted materials;
4. I and any firm designated below agree to be bound by the Protective Order;
5. I shall not disclose or use the contents of Restricted materials, or any notes, memoranda, or other form of information reflecting the contents of the Restricted materials, other than in accordance with the terms of the Protective Order;
6. When informed by counsel for my client, I shall return or destroy Restricted materials as provided by the Protective Order; and
7. I understand that a violation of this certificate constitutes a violation of an order of the Copyright Royalty Judges.

I certify that I am authorized to represent and sign on behalf of any "Organization" that is identified below and to bind agents and employees of the Organization to the terms of the Protective Order.

DATED:

\_\_\_\_\_  
SIGNATURE  
ORGANIZATION:

\_\_\_\_\_  
PRINT NAME  
TITLE:



# EXHIBIT C

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES

The Library of Congress

*In re*

~~DETERMINATION OF WEBCASTING ROYALTY RATES~~ ~~Docket No. 14-CRB-0001-WR~~  
~~AND TERMS FOR EPHEMERAL RECORDING AND~~ ~~(2016-2020) (Web IV)~~  
~~DIGITAL PERFORMANCE OF SOUND RECORDINGS~~

*In re*

Determination of Royalty Rates and Terms  
for Transmission of Sound Recordings by  
Satellite Radio and "Preexisting"  
Subscription Services (SDARS III)

Docket No. 16-CRB-0001-SR/PSSR (2018-2022)

**PROTECTIVE ORDER**

**I.     The ~~Parties~~ Participants**

As of the date of this Order, ~~seventeen (17)~~ participants remain active in the captioned proceeding (~~the "Participants"~~). This Protective Order pertains to the captioned proceeding only, and binds the remaining ~~participants~~ Participants.

**II.    Authority**

The Copyright Royalty Judges ("~~the "Judges"~~") reiterate a strong presumption ~~in favor~~ ~~of that~~ the public interest ~~in favors~~ access to the records of the subject proceeding. Section 803(c)(5) of the Copyright Act (~~the "Act"~~) nonetheless authorizes the Judges to issue protective orders "~~as may be appropriate to protect confidential information . . .~~" 17 U.S.C. § 803(c)(5). In prior proceedings, the Judges have issued protective orders to facilitate and expedite discovery in both rate determination and distribution proceedings.<sup>1</sup>

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<sup>1</sup> See, e.g., Protective Order, Dkt. No. 14-CRB-0001-WR (Oct. 10, 2014) (Webcasting IV); Protective Order, Docket No. 2009-1 (Sept. 23, 2009) (Webcasting III); Protective Order, Dkt. No. 2011-1 CRB PSS/Satellite II (Nov. 16, 2011) (SDARS II).



### III. Protected Material

The Act does not define "confidential" information, ~~but,~~ The Participants, however, agree that in this proceeding (as has been proposed by participants in prior proceedings ~~the participants have proposed orders that describe the protectable information as information that is~~) that "confidential information" protectable under this Order shall consist of commercial or financial information disclosed by any means (including, but not limited to, through documents, testimony, or argument), by a Participant (the "Producing Participant") to another Participant or other Participants, that the Producing Party has reasonably determined in good faith would, if disclosed, either competitively (i) result in a competitive disadvantage to the Producing Party, producing Participant, (ii) provide a competitive advantage to another party Participant or entity, or (iii) interfere with the ability of the Producing Party Participant to obtain like information from other Participants or entities in the future.

The ~~parties~~ Participants further agree in this proceeding, as they have in prior proceedings, to exempt from the requirements of this ~~protective order~~ Order any document or information that: ~~(4i)~~ may be found in the public records of the Copyright Royalty Board, the Copyright Office, or any other federal or state governmental agency; and

*See, e.g., Protective Order, Docket No. 2009-1 (Sept. 23, 2009) (Webeasting I10; Protective Order, Docket No. 2011-1 CRB-PSS/Satellite II (Nov. 16, 2011) (SDARS I1).*

~~Protective Order - I(2) was:~~ or (ii) was, is, or during the pendency of the subject proceeding becomes, legitimately, public information.

### IV. ~~IV.~~ Protective Measures

#### A. ~~A.~~ Production

~~Any party producing confidential documents or information to another party or other parties in this proceeding or providing testimony ("Producing Party") shall meet the following requirements:~~

(1) — The Producing Party Participant shall mark with a conspicuous label of "RESTRICTED — Subject to Protective Order in Docket No. 14-16-CRB-0001-WR-(2016-20) (Web IV) - 0001-SR/PSSR (2018-2022) (SDARS III)" all material that the Producing Party Participant, reasonably and in good faith, asserts ~~is to be~~ "confidential information" protected by this order (such material hereinafter referred to as "Restricted"). The Producing Party Participant shall mark Restricted portions with highlights or brackets, marking information to the narrowest extent possible to achieve the goal of maintaining confidentiality.

(2) — The Producing Party Participant shall deliver with all Restricted materials an affidavit or declaration signed under penalty of perjury listing a description of all materials marked with the "Restricted" stamp and the basis for the designation.

#### B. ~~B.~~ Receipt

A party Participant may receive Restricted materials only by and through outside counsel of record in this proceeding. Any party Participant receiving Restricted material from another



~~party~~ Participant or other ~~parties~~ Participants in this proceeding ("~~Receiving Party~~" Participant") shall use the Restricted material solely for the purposes of this proceeding, and shall guard and maintain the confidentiality of all Restricted materials. The Receiving ~~Party~~ Participant, by and through counsel of record in this proceeding, shall execute and abide by a Non-Disclosure Certificate, substantially in the form attached to this order as "~~Exhibit A.~~" Before revealing Restricted materials to any other entity, the Receiving ~~Party~~ Participant shall obtain from an authorized representative of the ~~Receiving Party~~, receiving entity a Non-Disclosure Certificate in like ~~the~~ form.

The Receiving ~~Party~~ Participant shall limit access to Restricted materials to:

- ~~(1) Outside~~ outside counsel of record in this proceeding, including attorneys, paralegals and clerical employees required by involvement in this proceeding to view the Restricted materials;
- ~~(2) The~~ the personnel supplied by any independent contractor (including litigation support service personnel) with whom such attorneys work, to the extent counsel deems necessary for the sole purpose of assisting in this proceeding; and
- any outside independent consultant or expert (hereinafter, "expert") who is assisting a Participant to the proceeding and to whom counsel determines disclosure is necessary for the limited purpose of assisting in, or consulting with respect to, this proceeding.

~~(3) — Any outside independent consultant or expert (hereinafter, "expert") who is assisting a party to the proceeding and to whom counsel determines disclosure is necessary for the limited purpose of assisting in, or consulting with respect to, this proceeding. A consultant or expert is "independent" if he or she has no interest, financial or otherwise, in the outcome of this proceeding, and is not an employee of, and plays no ongoing role in the management of, (ai) any party Participant or any competitor thereof, (bii) a trade association that represents parties Participants or competitors or members of parties or competitors, or (e) a member Participants or competitors, or (iii) a member of a trade association or licensing agent that is a Participant. If any Participant seeks to challenge the independence of another Participant's designated expert, the Participants shall follow the procedure described in section D of this Protective Order.~~

~~Protective Order—2~~

~~of a trade association or licensing agent that is a party. If any party seeks to challenge the independence of another party's designated expert, the parties shall follow the procedure described in section D of this Protective Order.~~



### C. ~~C.~~ Use of Restricted Materials

The Receiving ~~Party~~ Participant may use Restricted materials, plainly marked in accordance with this Protective Order and filed under seal, in any portion of this proceeding, including during the examination of witnesses, at ~~any hearing~~, closing argument, and in its proposed findings and conclusions.

When a ~~party~~ Participant refers to Restricted materials in any filings with the Judges, the ~~participant~~ Participant shall file the Restricted materials under seal and file concurrently suitably redacted papers for inclusion in the Judges' public record. Any Participant or other entity ~~filing that files~~ redacted and sealed papers must also file a "'redaction log"' containing, for every item claimed as Restricted, (1) an identification of the document or other source by title, page number, and Producing ~~Party~~ Participant; (2) the basis or bases for the redaction; and (3) a description of the redacted material sufficient to permit any receiving or reviewing ~~party~~ Participant to challenge the material's designation as "Restricted."

Examination of a witness concerning Restricted material shall be conducted *in camera* and closed to all persons except ~~parties~~ Participants authorized by the terms of this Protective Order. Any portion of the hearing transcript that refers to ~~the~~ Restricted material shall be sealed and subject to this Protective Order. To the extent possible, the court reporter shall segregate into separate transcripts information designated as Restricted, with blank, consecutively numbered pages being provided in a ~~nondesignated~~ non-designated main transcript. The separate transcript containing Restricted material shall have page numbers that correspond to the blank pages in the main transcript. ~~Parties~~ Participants shall provide copies of all Restricted materials that the Judges admit into evidence in sealed, confidential envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order.

Within twenty-one (21) days after the conclusion of this proceeding,<sup>2</sup> the Receiving ~~Party~~ Participant of any Restricted materials, shall return to the Producing ~~Party~~ Participant all Restricted materials, including any additional copies, notes, or records in any form reflecting the contents of Restricted materials. In the alternative, the Receiving ~~Party~~ Participant may destroy all Restricted materials, additional copies, notes, and records in any form reflecting the contents of the Restricted materials and must tender to counsel for the Producing ~~Party~~ Participant an affidavit or declaration under penalty of perjury verifying that all Restricted materials, copies, notes, and records ~~are were~~ destroyed. Nothing in these paragraphs shall prohibit a ~~party~~ Participant's outside counsel from retaining copies of any written testimony, brief, motion, pleading, or other filed document, exhibit, transcript, or internal memorandum ~~or workpaper~~ that reflects Restricted materials, provided that any Restricted materials retained by counsel shall remain subject to the provisions of this Protective Order.

<sup>2</sup> ~~The conclusion of this proceeding shall occur at the resolution of all available appeals or, if no party files an appeal, at the end of the time period allowed for noting an appeal.~~

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<sup>2</sup> The conclusion of this proceeding shall occur at the resolution of all available appeals or, if no Participant files an appeal, at the end of the time period allowed for noting an appeal.



**D. ~~D.~~ Motions to Expand the Scope of the Protective Order or to Challenge Designation of Restricted Materials**

All ~~parties~~ Participants shall use the following procedure to seek permission to disclose Restricted materials to a person or entity not expressly authorized by the Protective Order or to challenge the nature or extent of the Producing ~~Party~~ Participant's Restricted designation(s).

~~(1)~~ 1. The Receiving ~~Party~~ Participant shall notify the Producing ~~Party~~ Participant by email of the details of its request. In a document attachment to the email, the Receiving ~~Party~~ Participant shall state, in detail, the factual and legal bases for its request.

~~(2)~~ 2. Within four (4) business days, the Producing ~~Party~~ Participant shall respond by email. If the Producing ~~Party~~ Participant does not agree to the Receiving ~~Party~~ Participant's request, then in a document attachment to the email, the Producing ~~Party~~ Participant shall state the factual and legal bases for its refusal to agree. If the Producing ~~Party~~ Participant fails to respond to the request or fails to attach the required document, then the Judges may grant the request.

~~(3)~~ 3. On the same date as calculated for step ~~(2)~~ 2, if the Producing ~~Party~~ Participant has objected to the Receiving ~~Party~~ Participant's request, in whole or in part, the Producing ~~Party~~ Participant shall file with the Judges, in accordance with the Judges' procedural regulations, the ~~parties~~ Participants' emails and attachments and shall also forward them to the Judges by email at ~~crb@loc.gov~~ crb@loc.gov. The Judges will consider the papers submitted by the Producing ~~Party~~ Participant to be a motion by the Receiving ~~Party~~ Participant and a response by the Producing ~~Party~~ Participant. The Judges will not accept from the Producing ~~Party~~ Participant or the Receiving ~~Party~~ Participant any papers that have not been already provided to the other ~~party~~ Participant in interest. The Producing ~~Party~~ Participant shall deliver these emails and attachments to all ~~parties~~ Participants in this proceeding in accordance with the Judges' procedural regulations.

~~(4)~~ 4. Any ~~party~~ Participant other than the Producing ~~Party~~ Participant or the Receiving ~~Party~~ Participant wishing to make a substantive filing with regard to the request and the objection thereto shall file a written submission with the Judges within two (2) business days after receiving notice of the motion, delivering the response papers to all other ~~parties~~ Participants in this proceeding, and shall forward the submission to the Judges by email at crb@loc.gov. However, no other ~~party~~ Participant may seek permission to disclose Restricted materials or to challenge a Restricted designation in these submissions.

~~(5)~~ 5. The Judges will decide the issue(s) as soon as possible on the basis of the papers filed and delivered through the procedure described above, without reply papers or oral argument, unless the Judges order otherwise.

The Producing ~~Party~~ Participant shall bear the burden of justifying the designation or limitation it seeks to impose.



**E.     ~~E.~~ Inadvertent Disclosure of Privileged Material**

(1) The inadvertent production or filing of any document or other information in connection with this proceeding shall be without prejudice to any claim that the inadvertently disclosed material is privileged under the attorney-client or other privilege, or protected from disclosure as work product, and the Producing ~~Party~~Participant or filing ~~party~~

~~Protective Order—4~~Participant shall not be held to have waived any rights by inadvertent production. In the event that a Producing ~~Party~~Participant discloses or files inadvertently disclosed material that the Producing ~~Party~~Participant or filing ~~party~~Participant considers to be privileged in whole or in part, the Producing ~~Party~~Participant or filing ~~party~~Participant may retrieve the inadvertently disclosed material by giving written notice to the Receiving ~~Party(ies) not~~Participant(s) no later than five (5) business days after discovery of the inadvertent production or filing of such material; ~~that the Producing Party or filing party claims the material, in whole or in part, to be privileged.~~ The notice must state the nature of the privilege.

(2) Upon receipt of notice, each Receiving ~~Party~~Participant shall ~~return~~ promptly return to the Producing ~~Party~~Participant or filing ~~party~~Participant the original and all copies of the material to which the notice pertains. In the event that only part of the material is claimed to be privileged, the Producing ~~Party~~Participant or filing ~~party~~Participant shall furnish redacted copies of ~~the~~ material, (removing only ~~the part(s)~~those parts claimed to be privileged,) to all Receiving ~~Parties~~Participants, together with the written notice. Upon receipt of the redacted copy, each Receiving ~~Party~~Participant shall return promptly to the Producing ~~Party~~Participant or filing ~~party~~Participant the original and all copies of the unredacted material.

**F.     ~~F.~~ Inadvertent Failure to Designate**

(1) — The inadvertent failure by a Producing ~~Party~~Participant to designate any document or other information as ~~"RESTRICTED"~~"RESTRICTED" material under this Protective Order shall not waive any such designation provided that ~~the Producing Party notifies all Receiving Parties that~~such document or other information is protected under this Protective Order within five (5) business days of the Producing ~~Party~~ learning of the inadvertent failure to designate. ~~The Producing Party~~within five (5) business days of the Producing Participant learning of the inadvertent failure to designate, ~~the Producing Participant notifies all Receiving Participants that~~ such document or other information is protected under this Protective Order. The Producing Participant shall reproduce the document or other information with the correct confidentiality designation concurrently with its notification to the Receiving ~~Parties~~Participants. Upon receiving the document or other information with the correct confidentiality designation, the Receiving ~~Parties~~Participants shall return or securely destroy, at the Producing ~~Party~~Participant's option, all documents or other information that ~~are~~were not properly designated properly.

(2) — A Receiving ~~Party~~Participant shall not be in breach of this Protective Order for any use of the documents or other information before the Receiving ~~Party~~Participant receives notice that such material is protected under this Protective Order, unless an objectively reasonable person would have realized that the material should have been appropriately designated as Restricted under this Protective Order. Once a Receiving ~~Party~~Participant has received notice of the correct designation for the material, the Receiving ~~Party~~Participant shall treat the material as Restricted



under this Protective Order, reserving all rights to assert that the re-designation is not proper under the procedures set forth herein regarding the challenging of designations.

~~(3)~~—Notwithstanding the above, a subsequent designation of "RESTRICTED" shall apply on a going-forward basis.

**G. ~~G.~~ Inadvertent Disclosure to Unauthorized Persons**

~~(1)~~ In the event of a disclosure of any Restricted materials pursuant to this Protective Order to any person or persons not authorized under this Protective Order, the ~~party~~ Participant responsible for having made the unauthorized disclosure, and each ~~party~~ Participant with knowledge thereof, shall notify immediately counsel for the Producing ~~Party~~ Participant whose Restricted materials have been disclosed and provide to said counsel all known relevant information

~~Protective Order--5~~ concerning the nature and circumstances of the disclosure. The responsible disclosing ~~party~~ Participant shall also ~~take~~ promptly take all reasonable measures to retrieve the improperly disclosed Restricted materials, and to ensure that no further or greater unauthorized disclosure and/or use thereof ~~(2)~~ occurs.

Unauthorized or inadvertent disclosure shall not change the status of Restricted materials or waive the right to ~~hold~~ designate the disclosed document or information as "RESTRICTED."

**V. Production of Documents Subject to Confidentiality Restrictions**

Responsive, non-privileged, discoverable documents will not be withheld from production solely because they are subject to confidentiality restrictions imposed by private agreement with another entity, whether or not that entity is a Participant to this proceeding. Participants are hereby ordered not to withhold from production responsive, non-privileged, discoverable documents on the grounds that they are subject to confidentiality provisions in private agreements with third parties. Such documents may be designated Restricted hereunder, and shall be subject to the provisions and protections of this Protective Order.

**VI. ~~V.~~ Failure to Comply**

The Judges may sanction violations of this Protective Order as they deem appropriate, to the fullest extent permitted by law, including ~~exclusion of~~ by excluding evidence obtained, developed, or handled in any way contrary to the requirements ~~in of~~ this ~~protective order~~ Order.

**VII. ~~VI.~~ Order**

Based upon the foregoing agreements of the ~~parties~~ Participants, the Judges adopt the definition of "confidential information" subject to the terms of this Protective Order as detailed in part III above. The Judges hereby ORDER compliance with ~~part~~ parts IV and V of this Protective Order and endorse the sanctions described in part ~~V~~ VI.

**SO ORDERED.**



Suzanne M. Barnett  
Chief Copyright Royalty Judge

DATED: ~~October~~, 2014



## **EXHIBIT A**



Before the  
**UNITED STATES COPYRIGHT ROYALTY JUDGES**

**The Library of Congress**

*In re*

Docket No. 14-CRB-0001-WR  
(2016-2020) (Web IV)

~~DETERMINATION OF WEBCASTING ROYALTY RATES AND TERMS FOR EPHEMERAL  
RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS~~

*In re*

Determination of Royalty Rates and Terms  
for Transmission of Sound Recordings by  
Satellite Radio and "Preexisting"  
Subscription Services (SDARS III)

Docket No. 16-CRB-0001-SR/PSSR (2018-2022)

**NON-DISCLOSURE CERTIFICATE**

I certify that:

1. Restricted materials provided to me in connection with the captioned proceeding are subject to the terms and restrictions of the Protective Order entered on ~~October~~, 2014; \_\_\_\_\_, 2016;
2. I have received and read the Protective Order, and I have no unanswered questions regarding the content or implications of the Protective Order;
3. I and any firm designated below qualify under the Protective Order to have access to Restricted materials;
4. I and any firm designated below agree to be bound by the Protective Order;
5. I shall not disclose or use the contents of Restricted materials, or any notes, memoranda, or other form of information reflecting the contents of the Restricted materials, other than in accordance with the terms of the Protective Order;
6. When informed by counsel for my client, I shall return or destroy Restricted materials as provided by the Protective Order; and
7. I understand that a violation of this certificate constitutes a violation of an order of the Copyright Royalty Judges.



I certify that I am authorized to represent and sign on behalf of any "Organization" that is identified below and to bind agents and employees of the Organization to the terms of the Protective Order.

DATED:

---

SIGNATURE

ORGANIZATION:

PRINT NAME

TITLE:



Document comparison by Workshare Compare on Monday, June 06, 2016  
11:13:08 PM

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Document 2 ID	interwovenSite://AFDOCS/AFDOCS/13295651/2
Description	#13295651v2<AFDOCS> - Proposed Protective Order
Rendering set	Standard

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Format change	
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Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

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Moved to	9
Style change	0
Format changed	0
Total changes	465

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
Library of Congress  
Washington, D.C.

Received

JUN 07 2016

Copyright Royalty Board

In the Matter of:

Determination of Royalty Rates and Terms  
for Transmission of Sound Recordings by  
Satellite Radio and "Preexisting"  
Subscription Services (SDARS III)

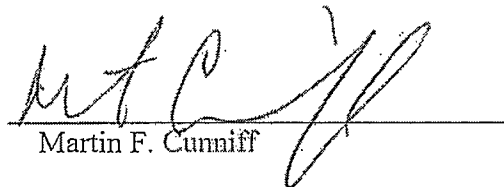
Docket No. 16-CRB-0001-SR/PSSR (2018-2022)

CERTIFICATE OF SERVICE

I, Martin F. Cunniff, hereby certify that a copy of the foregoing Joint Motion to Adopt Protective Order has been served this 7th day of June, 2016 by overnight express mail upon the following parties:

George Johnson  
GEO Music Group  
23 Music Square East, Suite 204  
Nashville, TN 37203

David Powell  
P.O. Box 010950  
Miami, FL 33101

  
Martin F. Cunniff